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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

PETITIONER'S REPLY BRIEF

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INDEX

PAGE

I—The Respondents' "Practical Solution" 2

II—The Twenty-First Amendment 4

III—The respondents' reversal of its previous continuous insistence on interim suppression and penalization of the petitioner's business 13

IV—The respondents' extraordinary claim as to what is not before this Court 16

V—The respondents' erroneous predicates for "discretion" 18

VI—The respondents' misconceptions of the petitioner's predicates for Federal judicial jurisdiction 19

VII—The respondents' concession "that abstention is inappropriate where the State law is settled" 21

TABLE OF AUTHORITIES

Cases:

Adams Express Co. v. New York, 232 U. S. 14, 30 6, 12

All American Airways v. Village of Cedarhurst, 201 F. 2d 273, 277 19

Board of Trustees v. United States, 289 U. S. 48 12

PAGE

C. J. Tower & Sons v. United States, 135 F. Supp. 874 9
California Commission v. United States, 355 U. S. 534, 538 17
Campbell v. Hussey, Jr., 30 U. S. L. Week 4095 18
Capital Service, Inc. v. Labor Board, 347 U. S. 501, 504 18
Collins v. Yosemite Park & Curry Co., 304 U. S. 518 9, 17

During v. Valente, 267 App. Div. 383, 46 N. Y. S. 2d 385 10, 11, 12

Florida Lime Growers v. Jacobson, Director, 362 U. S. 73, 85 17

General Electric Co. v. Callahan, 294 F. 2d 60, 65-6 17, 19

Harrison v. NAACP, 360 U. S. 167, 179 15
Hines v. Davidowitz, 312 U. S. 52 17

Jameson & Co. v. Morgenthau, 307 U. S. 171 9

McGoldrick v. Gulf Oil Corp., 309 U. S. 414 12

National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651, 297 P. 2d 61 11

Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 232, 280 P. 2d 881 11
Penagaricano v. Allen Corporation, 267 F. 2d 550, 557-8 18

Rosenblum v. Frankel, 279 App. Div. (1st Dept.) 66, 108 N. Y. S. 2d 6 11, 12

United States v. Gudger, 249 U. S. 373 10

Yellow Cab Transit Co. v. Johnson, 48 F. Supp. 594 10

PAGE

Statutes:

F. R. C. P. Rules:

8(e)(2) 20

8(f) 20

54(c) 20

57 20

United States Constitution:

Twenty-First Amendment 4, 5, 6, 8, 9, 10

Joint Resolutions of Congress:

Comprehensive Plan 8

Tariff Act:

Section 311 ..... 6, 20

28 U. S. C.:

§2281 ..... 2, 14

§2284 2

§1331 ..... 20, 21

§1337 ..... 20, 21

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PETITIONER'S REPLY BRIEF

The respondents' brief is extraordinary in many respects, particularly in its interjections of wholly new contentions and in its contradictions of their contentions below.

I

The Respondents' "Practical Solution"

In the first place, as a so-called "practical solution" (pp. 8, 38), the respondents' brief now *for the first time* advances the suggestion that this Court, whose jurisdiction is for the correction of errors, "enter an order" which of necessity would predicate as erroneous:

> (1) The respective refusals of Judges Bicks, Dimock and Cashin to convene forthwith a statutory court pursuant to 28 U. S C. §§2281, 2284.
>
> (2) The respondents' own contention throughout the courts below that no substantial federal question sufficiently appeared to require the immediate convening of a statutory court to determine the petitioner's rights, including its motion for a temporary injunction.
>
> (3) The respondents' own contention from the first that "abstention constituted a proper exercise of discretion" by Judges Bicks, Dimock and Cashin.
>
> (4) The decision of the Court of Appeals that it was powerless to grant the petitioner any relief or protection at all.

Thus the respondents have at last argued themselves into denying their own motion to dismiss for insufficiency and lack of jurisdiction (42a).

To these ends the respondents' brief states that "the order" to be entered by this Court should (pp. 8, 38):

> (a) "Grant the petition for mandamus".
>
> (b) Direct the single-judge District Court to convene a statutory court forthwith.
>
> (c) Direct the statutory court "to retain jurisdiction", but stay further proceedings until the state

courts had disposed of the alleged "related question of State law".

By way of predicating jurisdiction in this Supreme Court to enter such an order, the respondents' brief now acknowledges *for the first time* (p. 38):

> "The petitioner, asserting a threatened infringement of its rights under the Federal Constitution, may have a cause of action which it can assert in the Federal Courts. It should not be foreclosed from bringing such suit nor should it be subjected to irreparable harm pending the judicial determination of those rights."

Thus, among the many serious anomalies into which the respondents' "practical solution" would invite this Court, not the least serious would be the issuing of a directed decision to a court which as yet has no existence, has not heard the parties, and has made no decision from which appeal to this Court would lie,—an anomaly compounded by the fact that any hypothetical appeal in the future would already have been decided by this Court in advance of the decision to be appealed from.

Compounding these anomalies further would seem beyond ingenuity, yet the respondents succeed in so doing when they close their "practical solution" by interjecting into it the self-contradiction (p. 39) that thereby it "becomes unnecessary for the Court to determine whether the single-judge District Court has the power, in the first instance, to order abstention".

But how could this Court issue to such single judge its mandamus to convene the statutory court immediately, except by determining that the single-judge court had no power to do otherwise?

Finally, implicit in the last-minute making of this "practical solution" is the evident recognition by the re-

spondents that the results thus far have not been "fair" (p. 8), and that their injustice (as usual with injustice) is pregnant with illegalities. Yet for precisely those not "fair" results have the respondents themselves been strenuously, and thus far successfully, contending in all the courts below.

Hence, we cannot read their last-minute "practical solution" otherwise than as a confession of errors, or at least as an educated anticipation of this Court's corrections of errors.

II

The Twenty-First Amendment

(1) The respondents' brief is also extraordinary in its interjection of another wholly new contention.

Now, a year and a half after the commencement of this much litigated action, the respondents claim *for the first time* the Twenty-first Amendment.

On page 3 the respondents' brief places first in its "Questions Presented" this:

> "1. Are the operations of the petitioner subject to paramount control of the State by virtue of the Twenty-first Amendment to the Federal Constitution?"

Not even in their brief opposing the petitioner's application for leave to come to this Court had such a "Question" been advanced by them.

(2) Precisely as in the case of their "practical solution", this second wholly new after-thought entangles the respondents in self-contradictions and anomalies.

If before any of three single judges in the District Court or before the Court of Appeals, the respondents had put forward this "Question" as to the applicability of

the Twenty-first Amendment, then they themselves would have demonstrated at the very threshold of the action the presence of a preeminently substantial and primary federal constitutional question,—contrary to all their claims heretofore that no such substantial question as yet appeared.

Indeed, the respondents' own brief *now* asserts as to their belated discovery of the Twenty-first Amendment (p. 22):

> "This point, as has already been stated, is a federal question * * *."

Such a "question" is by its very nature one which demands forum in the federal courts.

(3) But the short answer is that the Twenty-first Amendment has no application whatever to this national and international plan enacted by Congress for foreign exports of wines and liquors in reciprocity with foreign governments and for the consequent betterment of our national economy and our economic relations with other nations.

The Amendment has no application to liquor which, for such purpose and pursuant to such enactment, originates under the control and custody of the United States, is labelled "Bottled for export from the U. S. A.", and moves under such continuous control and custody through designated and authorized export channels to its intended delivery on foreign soil (2a-6a, 36a-38a).

Indeed the very opinion of the State Attorney General on which the Liquor Authority relies concedes that "delivery is not made within the State" (22a).

(4) The facts pleaded are admitted, since respondents' sole attack was by motion to dismiss for failure "to state a claim" (42a).

Moreover, those facts are rendered indubitable by the federal statutes and regulations elaborately reproduced in

the record (17a-20a, 150A-185A), and by the certificate of the U. S. Treasury Department, Bureau of Customs, dated April 15, 1958, that the *sole* business which the petitioner transacts (2a, 39a-40a) is a lawful and approved "exportation of the merchandise within the meaning of Section 311 of the Tariff Act" (15a, 16a, 37a).

These admitted facts conclusively show no importation into New York "for delivery or use" in New York, and no possibility thereof (11a).

From the moment the liquor is "Bottled for export from the U. S. A.", it moves in one continuous progress in foreign commerce through sanctioned channels in furtherance of the national purpose and under constant commitment, control and escort by the United States Government until it is ultimately delivered on foreign soil (10a).

It is incredible that New York, which is wholly unaffected by this liquor, can veto this federally conducted exportation, or that the Twenty-first Amendment could so operate without discovery thereof for the last twenty-eight years. Such prolonged practical construction is convincing of the law. (*Adams Express Co.* v. *New York*, 232 U. S. 14, 30.)

Add the further convincing fact that the New York State Department of Taxation ruled as far back as 1954 that New York is without power to tax sales such as those by the petitioner "at airports within the State of New York." (7a, 26a).

(5) As illustrative and conclusive of the foregoing, we quote the following from the admitted allegations of the complaint (4a, 5a):

> "The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and

continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U. S. C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of the plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and loading on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with

> their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses."

See also the further confirmatory allegations on pages 9a-11a, 35a-37a, and pertinent Federal Regulations, Bureau of Customs, 160A-163A.

(6) It must also be borne in mind that petitioner's leased premises are located in the International Airport at Idlewild (2a).

The petitioner's lease is with the Port of New York Authority which, as this Court judicially knows, is a bi-state instrumentality created by New York and New Jersey to develop and coordinate the facilities of commerce (particularly foreign commerce) within a radius of twenty-five miles from the Statue of Liberty. The enabling legislation and the ensuing "Comprehensive Plan" were approved by Joint Resolutions of Congress (42 Stat. 174 [1921] and 42 Stat. 822 [1922]), the first of which stipulated:

> "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

Commerce through this International Airport is under the supervision and control of the Bureau of Customs (160A-163A); and the petitioner's entire leased premises therein are "under the supervision and control of the United States Bureau of Customs both as to its construction and security and as to accountability for liquor exported" (3a, 36a).

(7) Respondents' brief cites no case applying the Twenty-first Amendment to facts in any way resembling the present.

An unbroken line of federal and New York decisions negative their contention.

In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, the appellant, an importer and distributor of alcoholic beverages, having been denied by the Secretary of the Treasury the right to import its product into the United States, sued for a declaratory judgment that the Federal Alcohol Administration Act was unconstitutional because of the Twenty-first Amendment. This Court held to the contrary, saying (pp. 172-3):

> "Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention."

In *C. J. Tower & Sons* v. *United States*, 135 F. Supp. 874, the United States Customs Court, Third Division, held that the holding of the courts, after ratification of the Twenty-first Amendment, that violations of the National Prohibition Act could no longer be prosecuted, was inapplicable to "a statute enacted under the federal power to regulate foreign commerce". The Court said (p. 881):

> "Said 21st amendment did not destroy the power of Congress to regulate foreign commerce, and, irrespective of that amendment, Congress retains its constitutional right to impose conditions upon the importation of intoxicating liquor into the United States."

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, this Court held that, notwithstanding the Twenty-first

Amendment, California could not require a license for the sale of imported beer in a national park which was in the State but under the control of the Federal Government, notwithstanding that the beer had been purchased outside of California and had been transported through it to the Park. This Court said (pp. 536-8):

> "The State makes the point that §2 of the XXI Amendment gives it the right to regulate the importation of intoxicating liquors. * * * The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem * * *, it did not increase its jurisdiction.' With this conclusion, we agree. * * * Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable."

To the same effect is *Yellow Cab Transit Co.* v. *Johnson*, 48 F. Supp. 594, where the court held that, notwithstanding the Twenty-first Amendment, Oklahoma had no control over the shipment of liquor from Illinois to Fort Sill Military Reservation located in Oklahoma. This decision was affirmed by the Circuit Court of Appeals, 137 F. 2d 274, and by this Court, 321 U. S. 383.

See also *United States* v. *Gudger*, 249 U. S. 373.

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385, the New York Appellate Division of the Supreme Court overruled the contention of the New York State Liquor Authority that the Twenty-first Amendment put under its jurisdiction Portuguese Brandy imported into the United States and stored in the Free Trade Zone of the Port of New York, located in New York City. The Court said (p. 386):

> "By its terms the Amendment grants power to a State to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery

> or use within such State. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the Amendment."

This ruling was followed by the same Court in *Rosenblum* v. *Frankel*, 279 App. Div. (1st Dept.) 66, 108 N. Y. S. 2d 6, where the New York Liquor Authority sought jurisdiction over industrial alcohol imported from the Virgin Islands. Said the Court (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State (*During* v. *Valente*, 267 App. Div. 383)."

In *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881, the court held concerning the Twenty-first Amendment and foreign commerce (280 P. 2d at p. 883):

> "The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which, under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned."

In the instant case the wines and liquors were always in their original packages, namely bottles labeled "Bottled for export from the U. S. A." (3a).

In *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, the court held that liquor imported by a California taxpayer from foreign countries and held by it in San Francisco as

the original importer and in the original package on tax day, was unlawfully subjected to California's personal property tax laws.

In *Board of Trustees* v. *United States*, 289 U. S. 48, this Court said (p. 58):

> "The purpose to regulate foreign commerce permeates the entire congressional plan."

In *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, this Court said (p. 428):

> "Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce by insuring that the particular class of exempted imports are used for the purposes for which the exemption is allowed."

(8) The opinion of the State Attorney General on which the Liquor Authority relies has overlooked these decisions and proceeds on the curious ground that, because the Statute does not authorize or provide for what the petitioner does, illegality must be deduced. But the silence of the Statute is much more reasonably attributable to legislative awareness that it should and could not be made applicable.

A state law which would require a party to take out a state license for carrying on foreign commerce would be unconstitutional. (*Adams Express Co.* v. *New York*, 232 U. S. 14, 31.)

(9) The respondents' brief says (p. 22) that these New York decisions (*During* and *Rosenblum*, *supra*) excluding the reach of the New York Alcoholic Beverage Control Law in cases of foreign commerce are "not binding upon this Court".

Why not? Surely this Court could not and will not undertake to say that a state statute has a reach and an application which the highest courts of the State have decided that it does not have. Otherwise this Court would be legislating for the State and overruling the state courts in a matter of state law.

(10) The decisions cited on pages 18-21 of respondents' brief have no application here.

They all concern *interstate* commerce,—transportation from one state into another for delivery or use in the latter as the place of destination, contrary to the latter's laws.

(11) On page 29 respondents' brief says that, in the interval between the loading and departure of the plane, the liquor is "physically in New York State and concededly under no direct governmental supervision or control". This is not the fact, and there is no such concession (5a, 9a, 10a; Federal Regulations, Bureau of Customs, 159A-163A). Moreover, on the plane the liquor is already in the course of foreign commerce and in transit out from the State of New York.

III

The respondents' reversal of its previous continuous insistence on interim suppression and penalization of the petitioner's business

(1) Another extraordinary innovation in the respondents' brief is that *now for the first time* the Liquor Authority promises no "enforcement proceedings" or "penalties" "until the dispute is settled".

The respondents' brief now *for the first time* makes the following concessions (p. 30):

> "It is conceded also that, by virtue of 28 U. S. C. §2281, the single-judge District Court, has no power

to grant a stay pending abstention. However, we do not hesitate to assure the Court, and we have been authorized by the State Liquor Authority to make such assurances, that the respondents, constituting the State Liquor Authority, will refrain from instituting enforcement proceedings until, or base penalties on conduct occurring before, the dispute is settled. With such assurances there can be no question regarding the adequacy of the State remedy (*Harrison* v. *NAACP*, 360 U. S. 167, 179 [1959])."

This "assurance" is the direct opposite of all preceding actions of the Authority and of the State Attorney General as its attorney, which included threats of immediate civil and criminal proceedings against it and its suppliers (7a, 8a, 39a, 40a).

Before Judge Bicks the Authority, by affidavit of its then Chairman, opposed the petitioner's applications for a preliminary injunction and restraining order (34a, 35a), and asked that all relief (interim and otherwise) "be denied in all respects" (44a-48a).

Before Judge Dimock the Authority maintained its same insistence, which by then had taken the forms of a subpoena duces tecum for all the petitioner's records and of threats to its suppliers to revoke their licenses. (Our prior brief, pp. 15-17.) So likewise before Judge Cashin (128a, 129a).

Nor was any such "assurance" tendered by the Authority in the U. S. Court of Appeals or in its brief opposing the petitioner's application to come here.

(2) Moreover, this last-minute "assurance" is itself so limited as to be utterly incomplete and inadequate.

The "assurance" bears no resemblance at all to the following comprehensive and effective restraining order deemed necessary by Judge Dimock pending the petitioner's appeal to the Court of Appeals (94a, 95a):

"ORDERED that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum.*"

(3) The respondents' brief (p. 31) cites *Harrison* v. *NAACP*, 360 U. S. 167, 179.

But there, as this Court therein observed (p. 179), the defendants had *from the outset* continued to cooperate in withholding any action under the state statutes "until a final decision is reached". Even then three of the Justices of this Court dissented.

It is one thing to have thus cooperated from the outset. It is an altogether different thing to reverse uncompromising militancy and to try to mend a precarious hold when in the court of last resort and much of the damage has already irreparably been done.

(4) Furthermore, the "assurance" is merely by way of attempting to overcome the conceded fact (pp. 30, 31), that, under the State Law, the petitioner would be "limited to a 30-day stay",—a grossly inadequate remedy. (Our prior brief, p. 43.)

The predicate in and for the "assurance" is that the petitioner, contrary to its will and contention, has been forced into the State courts.

IV

The respondents' extraordinary claim as to what is not before this Court

(1) The respondents' brief is also extraordinary for its claim that (p. 4):

> "An essential and integral part of the merits of the instant controversy is not now before this Court."

The respondents seek plausibility for this claim by presenting this suit *as if it were by them* for a judicial determination as to the rightness or wrongness of *their* interpretation of the state law.

The "essential and integral part of the merits of the instant controversy" is, on the contrary, the rightness or wrongness of the respondents' violations of the petitioner's federal rights and sanctions.

That issue in itself supplies one of the several substantial federal questions in the case, and is very much "before this Court."

(2) The respondents' reasoning overlooks that the Attorney General of the State of New York, in the exercise of his powers as the chief law officer of the State, has himself construed the State's Alcoholic Beverage Control Law as condemning as "illegal" what the petitioner is doing un-

der sanction of the federal law; that the State Liquor Authority has adopted this ruling as binding on it; that both the Attorney General and the Authority have proceeded to give it effect disastrous to the petitioner's federally sanctioned business; and that in this very action before this very Court both are now supporting their alleged right so to proceed.

Hence, it does not lie with them to claim as an open question to be first tested in the State courts the very interpretation of the State law which they avow as the sole sanction for their acts destructive of the petitioner's federal rights, or to endeavor to hold off the petitioner from his federal remedies until their actions have been tested in the State courts.

They themselves have precipitated the clash which has created both the federal jurisdiction and the substantial federal question. To paraphrase Judge Dimock (91a), they themselves as officers of the State of New York are proceeding in the name of New York law to destroy as unlawful what "has been ruled by the United States to be lawful foreign commerce".

Hence it is enough for federal jurisdiction and its federal exercise that, as said in *California Commission* v. *United States*, 355 U. S. 534, 538:

> "The Commission has plainly indicated an intent to enforce the Act."

Accord: *Florida Lime Growers* v. *Jacobsen, Director*, 362 U. S. 73, 85; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518; *Hines* v. *Davidowitz*, 312 U. S. 52; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 65-6.

The choice of forum should be with the petitioner whose federal rights and property are invaded and not be dictated by the invaders.

V

The respondents' erroneous predicates for "discretion"

At page 16 the respondents' brief says:

> "Where, as here, a question under the Federal Constitution is dependent upon the resolution of an uncertain point of State law, the State remedy being adequate, the District Court properly exercised its discretion in invoking the doctrine of abstention."

In this statement all the predicates and the conclusion are in error:

(1) Here the original jurisdiction of the Federal Court arises from the immediate irreparable damage being done by the respondent Liquor Authority on the advice of the State Attorney General to the petitioner's federally created and controlled export business conducted in furtherance of the national and international purposes of Section 311 of the Tariff Act of 1930 and of the reciprocal agreements made thereunder with foreign nations. (Our prior brief, pp. 11, 12.)

(2) Such jurisdiction is not "dependent upon the resolution of an uncertain point of State law", because (a) the national legislation is pre-emptive and exclusive; and because (b) such jurisdiction is "original" in a case such as this and would be operative for the petitioner's protection against the aggressor State officials whether right or wrong in *their* resolution of the meaning of the State law. (*Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, 504; *Penagaricano* v. *Allen Corporation*, 267 F. 2d 550, 557-8; our prior brief, p. 30.)

As said by this Court in *Campbell* v. *Hussey, Jr.*, in its decision rendered December 18, 1961, 30 U. S. L. Week 4095.

"We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption."

(3) The alleged "point of State law" is not "uncertain" at all, but was long ago settled adversely to the respondents by the State's highest courts. Since the State courts have held that the State statute does not reach foreign commerce conducted according to express congressional legislation, the interpretation of some phrase or word in that statute is irrelevant and beside any point here. (Our prior brief, pp. 40-4.)

(4) The so-called "State remedy" is not "adequate". (Our prior brief, pp. 43-5.)

(5) "Discretion" cannot justify refusal of a jurisdiction which exists as a matter of right and was expressly created and imposed by Congress for the very purpose of protecting and enforcing the Constitution, laws and treaties of the United States, and the Acts of Congress in regulation of foreign commerce. (*All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 66.)

"Discretion" cannot justify giving to the invader of rights and property the choice of forum.

VI

The respondents' misconceptions of the petitioner's predicates for Federal judicial jurisdiction

(1) Constantly the respondents' brief erroneously assumes that the petitioner predicates jurisdiction in the Federal Court "*solely* on the alleged violation by the State statutes" of the United States Constitution. (See pp. 4 footnote, 6, 12, 16, 34, etc.)

On the contrary, the petitioner predicates such jurisdiction on each and all of the several grounds stated in our prior brief under "Summary of Argument", pp. 19-24, and in Point X, p. 51; and it is entitled to whatever relief the statement of claim justifies irrespective of the wording of the prayer. (F. R. C. P., Rules 8(e)(2) and (f), Rule 54(c) and Rule 57.)

(2) In the present case, the statement of claim presents valid claims and rights to relief under both Sections 1331 and 1337. It is not confined to matter arising "under the Constitution". It also comprehends matters arising "under the laws or treaties of the United States" or under Acts of Congress "regulating commerce".

In point of Federal original jurisdiction the complaint would be entirely sufficient even if the prayer for a statutory court had been omitted.

For example, since the statutory plan embodied in Section 311 of the Tariff Act of 1930 and associated statutes and regulations is *pre-emptive*, the wrongs pleaded as done to the petitioner thereunder are equally as actionable in the district court under 28 U. S. C. §§1331 and 1337, as are the wrongs pleaded as done the petitioner under alleged authority of the State statute in violation of the United States Constitution.

(3) Judge Dimock put the anchorage of this action in both Sections 1331 and 1337 and in all the grounds of jurisdiction therein respectively specified, when he said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

Such an issue is by the very statement of it not only a substantial but a "serious" federal issue,—one squarely

and literally within *all* the respective grounds of original jurisdiction specified in Sections 1331 and 1337, and within all the rights to relief administrable hereunder.

VII

The respondents' concession "that abstention is inappropriate where the State law is settled"

This concession appears at page 29 and is forced by the cited decisions of this Court.

The respondents' attempt to escape the fatal consequence by contending (p. 29) that, notwithstanding New York decisions cited *supra* and in our prior brief (pp. 41-43) settle *as the law of New York* that its Beverage Control Law is inapplicable to foreign commerce in general and to exports under Section 311 of the Tariff Act in particular, nevertheless there somehow remains open a state question as to whether the word "sales" in the Law would include the petitioner's business.

But, if the applicability of the Law itself to foreign commerce is foreclosed as regards New York by the New York decisions themselves, the meaning of its word "sales" is likewise foreclosed from applicability and, as regards this case, is also irrelevant and moot.

Respectfully submitted,

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